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In the Supreme Court of the United States

OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a substantial federal question is presented when a State trial court, in an FELA action, excludes from the jury's consideration evidence regarding the impact of income taxes on the decedent's gross earnings?

2. Whether a substantial federal question is involved where a State trial court in an FELA action refuses to give a "cautionary" instruction that any damages awarded are tax exempt, although the jury is otherwise fully instructed as to all relevant elements in assessing damages.

REASONS FOR DENIAL OF WRIT

Contrary to petitioner's contentions, the grant of certiorari by this Court in *Rediker* v. *Chicago, Rock Island & Pacific R. Co.*, 1 Kans. App. 2d 581, 571 P.2d 70 (1977) cert. granted 435 U.S. 922 (1978) (dismissed pursuant to Supreme Court Rule 60), does not control the Court's consideration of the instant petition. The *Rediker* case is immediately distinguishable since there petitioner presented substantial constitutional questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the instant case petitioner wholly failed to raise or preserve any constitutional issues.

ARGUMENT

I. Petitioner has failed to raise any substantial federal question warranting this Court's consideration.

Even though the two grounds upon which petitioner seeks certiorari are interrelated and involve questions of federal income tax, the issues are separate and distinct and require individual treatment.

While a federal question arises because this is an FELA action, it is axiomatic that "the mere presence of a federal question will not permit review . . . unless that federal question is substantial." Wright, *Federal Courts* (3d Ed. 1976) p. 41. There is no substantial overriding federal interest in exerting control over the details and nuances of damage assessment procedures followed by State courts in FELA actions.

II. The overwhelming weight of authority contradicts the Petitioner's contention that the "net earnings rule" should apply in FELA cases.

A. Refusal by a State court to apply the "net earnings" rule does not raise any substantial federal question.

(1) *The alleged conflict between the circuits has no bearing on the instant case.*

Petitioner attempts to dramatize an alleged conflict amongst federal and state courts as to whether "the gross earnings" or "net earnings" rule should be considered in computing a decedent's lost earnings. Significantly, however, as noted in *Huddell* v. *Levin*, 395 F. Supp. 64, 85 (D.C. N.J. 1975), as of 1975 all but one State court followed the "gross earnings" rule invoked by the Illinois court in the case at bar. See also 63 ALR 2d 1393 and supplements thereto.

Further, the purported conflict between the federal circuits claimed by petitioner has no relevance to the instant case because decedent was not a substantial wage earner. The alleged conflict amongst the circuits is whether the "gross earnings" rule should be applied in *all cases*, or whether a modified "gross earnings" rule should be considered in select cases where a decedent's earning capacity is so substantial that taxation of those earnings would significantly reduce the amount of his lost wages. Cf. *Johnson* v. *Penrod Drilling Co.*, 510 F. 2d 234 (5th Cir. 1975) ("Gross earnings" should be applied in all cases) and *McWeeney* v. *New York, N.H. & RR*, 28 F. 2d 34 (2nd Cir. 1960) (Modified gross earnings rule applied only where income taxes would substantially reduce wages.) Only one circuit has even contemplated adoption of a "net"

earnings rule for all cases and it ultimately refused to do so on the persuasive weight of authority from other circuits which follow the modified "gross earnings" of *McWeeney*. See: *Burlington Northern Inc.* v. *Boxberger*, 529 F. 2d 284, 295 (9th Cir. 1975).

Decedent in the instant case was a common laborer employed as a railroad brakeman with an annual salary of $13,000 at the date of death. Without serious dispute, the impact of income taxes on his total earning power would have been insignificant, even in those jurisdictions which have applied a modified gross earnings rule. Had the instant case been tried in those jurisdictions, the result would have been predictably the same: the jury would have been precluded from considering future income taxes upon decedent's lost earnings in computing damages.

The alleged "conflict" is overblown by petitioner to contrive a substantial federal question where none exists.

(2) *The result in the instant case is supported by the overwhelming majority of jurisdictions which have addressed the question.*

The trial court's exclusion of evidence as to the effect of taxation of decedent's earnings was proper and just. The minimal benefit gained by permitting consideration of income tax impact, weighed against the potential for error which would result from the necessary exploration of numerous collateral matters, definitely supported the trial court's order of exclusion.

To apply the inclusionary rule, as urged by petitioner, would be an invitation to endless speculation by the jury as to the number of possible exemptions, the type and amount of deductions, the effect of tax exempt earning, tax shelters, taxes on investment earnings, as well as potential changes in all of these items over the life expectancy of

the decedent—a mass of details far afield of the jury's function of rendering a just verdict. As aptly noted by the District Court in *Huddell* v. *Levin*, supra:

> "The difficulty of predicting the future of the tax code and its applicability to unknown individual decisions of a taxpayer is compounded by the confusion between the jury's traditional role as a fact finder and the need to make legal determinations in considering tax consequences . . . Most lawyers spend a full year in law school just to familiarize themselves with basic income tax law; State judges are never exposed to federal tax issues; and even federal judges are rarely exposed to such complicated tax problems. The possibility of conflicting expert testimony extending the average trial by at least a day is not remote. Even then the trial judge and counsel, much less a lay jury, could not realistically be expected to face this task with other than utmost confusion." (95 F. Supp. at 89-90).

And in *Rodriguez* v. *McDonnell Douglas Corp.*, 51 Cal. Rptr. 399 (Dec. 1978), the court said at p. 422:

> "The less speculation that is involved in the jury's fact-finding process, the more likely will jury awards conform to the standard of fairness and justice between litigating parties."

For the foregoing reasons the overwhelming majority of courts which have addressed the question have unequivocally held that as a matter of law, logic and sound judicial policy, the measure of damages predicated on gross earnings should not be diminished by a consideration of income tax impact and have excluded such evidence. See: 63 A.L.R. 2d 1393 and supplements. The majority view on this question is eminently sound and should not be disturbed by any consideration or pronouncement by this Court.

Further the introduction of the proposed "net earnings" rule would require the introduction of other collateral considerations which a jury must necessarily take into account. If the jury may be told that future income of the decedent must be reduced to "net earnings" after taxes, then the jury should also be instructed that the reinvestment of a lump sum at a certain rate of interest would produce less on a net basis, because of the applicability of taxes. See: *McWeeney* supra, at p. 37. Further, the jury should also be instructed that any award rendered in favor of the plaintiff would be reduced by court costs and attorneys fees and other litigation expenses. Application of the "net earnings" rule would therefore open the sluice gates to a flood of collateral and extraneous matters and seriously impair the objective of a fair trial.

B. Petitioner has failed to preserve the issue of the "net earnings" rule for review.

There is no competent evidence in the instant record to justify petitioner's position that the application of the "net earnings" rule would have resulted in any significant reduction of the jury verdict. The "offer of proof" made by the attorney for the defendant merely consisted of an unsupported statement that defendant's expert would testify that there would be a reduction of $57,000 (A-35-36) in the amount of decedent's lost earnings if the impact of future taxation was considered. No testimony was offered with respect to a number of variables, including the type and number of exemptions and deductions or the applicable rates of taxation over the decedent's life expectancy, to substantiate this conclusion. Absent such data, the trial court was unable to determine the competency of the income tax figures proffered by defendant, and, therefore, under State law, correctly rejected the offer of proof. *Austin Liquor Mart, Inc.* v. *Dept. of Revenue,* 18 Ill. App. 3d 894, 906, 310 N.E.2d 719 (1974); *Hession* v. *Liberty Asphalt Products Inc.,* 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17 (1968).

Since the petitioner's entire argument is predicated on the erroneous assumption that the "net earnings" rule is to be applied in *all* FELA cases without considering the income tax bracket of the plaintiff, and since the record in the instant case is totally devoid of any evidence which indicates that the application of the "gross earnings" rule operated to prejudice the petitioner, there is no basis for the claim that any question of importance is raised by the instant case.

III. Refusal of a cautionary instruction on the tax exempt status of the damage award was proper and presents no substantial federal question.

Petitioners fail to raise any substantial question worthy of this court's attention in their claim that the State trial court erred in refusing their tender of a cautionary instruction that the damages awarded would be tax exempt under 26 U.S.C. §104(a)(2).

Although the measure of damages in an FELA case may be determined by federal law, the form and content of jury instructions are matters of procedure in which the law of the forum controls.

Petitioner's claim rests on the unsupported premise that in rendering an award of damages the jury will assume that the award is taxable and augment its award to compensate for the tax factor. Such presumption is speculative and is negatived by the fact that the jury was thoroughly instructed as to the proper factors to be weighed in assessing damages which will properly compensate the plaintiff.

To open the door slightly for a cautionary instruction upon taxes is to open it wide for a multitude of cautionary instructions on other matters whose limit is bounded only the fertile imagination of trial counsel. *Hall* v. *C&NW Ry. Co.*, 5 Ill. 2d 135, 150-52 (1955).

It is noteworthy that most jurisdictions which considered these issues have held that the failure to give a cautionary instruction rested in the sound discretion of the trial court and was not reviewable, let alone reversible error. See 63 A.L.R. 2d 1393; *Nichols* v. *Marshall*, 486 F. 2d 791 (10th Cir. 1973); *Elston* v. *Shell Oil Co.*, 481 F. 2d 608 (5th Cir. 1973); *McWeeney* v. *New York N.H. & H.R.*, supra,; *New York Central RR* v. *Village*, 52 F. 2d 522 (6th Cir. 1958). Only two federal courts have required that an instruction be given and that requirement was prospective only. See *Domeracki* v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251 (3rd Cir. 1971) cert. denied, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed. 2d 165 (1971), *Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 297 (9th Cir. 1975). Further, there are no reported cases where the judgment of the trial court has been reversed because of the refusal to give this cautionary instruction.

No evidence exists in the instant case that the jury improperly overcompensated plaintiff for an "imagined" tax. Plaintiff's expert testified that a conservative estimate of the pecuniary loss resulting from decedent's death would be $302,000.00 (A. 190). That figure remains uncontroverted since defendant failed to present any countervailing evidence by an expert. The jury was also instructed that they could award plaintiff's children for the loss of the care, attention, instruction, training, advice and guidance of the decedent. The instant award of $775,000 was demonstrably not excessive nor indicative of the jury's attempt to inflate the award to compensate for an im-

agined tax. *Arguendo,* even if the damage award was deemed excessive, standing alone such issue would hardly warrant certiorari by this court.

IV. Consideration of tax consequences would contravene the purpose behind the tax exempt status of personal injury award.

The thrust of petitioner's contention is an oblique attack upon the tax exempt status of personal injury awards. The rationale for protecting the exempt status was pertinently mentioned by the District Court in *Huddell,* supra:

> "The decision of Congress not to tax personal injury awards obviously results in a benefit equal to the amount of taxes that would otherwise be paid to the Government. If defendants' argument is accepted, they will receive that benefit by being able to avoid payment of that portion of lost wages which it would have otherwise been the plaintiff's responsibility to pay as income taxes. If the majority rule is accepted, injured plaintiffs will receive the benefit. The court can devine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as will all exemptions under §104, '. . . intended to relieve a taxpayer who has the misfortune to become ill or injured . . .' " (395 F. Supp. at 87).

A cautionary instruction would operate to pass the remedial benefit to the tort feasor rather than to the injured taxpayer as was intended by Congress. As the Court noted in *Hall,* supra:

"And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified." (5 Ill. 2d at 152).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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